

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE
CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/26/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

VIRGINIA WOODBECK,)	No. 1 CA-IC 10-0047
)	
Petitioner Employee,)	DEPARTMENT E
)	
v.)	MEMORANDUM DECISION
)	(Not for Publication -
THE INDUSTRIAL COMMISSION OF ARIZONA,)	Rule 28, Arizona Rules
)	of Civil Appellate
Respondent,)	Procedure)
)	
SHERATON WILD HORSE PASS,)	
)	
Respondent Employer,)	
)	
ZURICH AMERICAN INSURANCE CO. c/o)	
GALLAGHER BASSETT SERVICES, INC.,)	
)	
Respondent Carrier.)	
)	

Special Action - Industrial Commission

ICA Claim No. 20090-960001

Carrier Claim No. 010515-077437-WC-01

Administrative Law Judge Anthony F. Halas

AWARD SET ASIDE

Law Office of Eric C. Averkamp
By Eric C. Averkamp
Attorney for Petitioner Employee

Mesa

Andrew F. Wade, Chief Counsel,
Industrial Commission of Arizona
Attorney for Respondent

Phoenix

S W A N N, Judge

¶1 Petitioner-employee Virginia Woodbeck ("Claimant") seeks review of the dismissal by the Industrial Commission of Arizona ("ICA") of her hearing request. The ICA dismissed her request as a sanction for her failure to appear at two depositions and respond to interrogatories. We conclude based on the record before us that the administrative law judge ("ALJ") abused his discretion when he entered the ultimate sanction of dismissal without considering the effectiveness of more modest measures, and we set aside the award.

FACTS AND PROCEDURAL HISTORY

¶2 On March 28, 2009, Claimant was working as a retail associate for respondent-employer Sheraton Wild Horse Pass when she fell off a loading dock and fractured her left kneecap. She filed a workers' compensation claim, which was accepted for benefits. Her claim eventually was closed with a 20% scheduled permanent partial impairment to the left lower extremity based on a January 12, 2010 independent medical examination ("IME") by Anikar Chhabra, M.D. Claimant timely requested a hearing and asserted that she was entitled to continuing benefits for injuries to her shoulder and teeth. An ICA hearing was scheduled for June 21, 2010.

¶13 On April 5, 2010, respondent-carrier Zurich American Insurance Company ("Zurich") filed a notice of appearance, served interrogatories on Claimant, and scheduled Claimant's deposition for April 30, 2010. On April 15, 2010, Zurich scheduled an IME with Michael Liebowitz, D.D.S., for May 21, 2010.

¶14 When Claimant did not appear for her deposition on April 30, 2010, Zurich filed a motion to dismiss her hearing request, or in the alternative, for an order compelling Claimant to appear for a reset deposition on May 21, 2010. The ALJ entered an order directing Claimant to answer Zurich's interrogatories within ten days and to appear for her rescheduled deposition. Claimant failed to appear for her rescheduled deposition, and Zurich filed a second motion to dismiss her hearing request, alleging that Claimant had failed to appear for two depositions, to answer interrogatories, and to provide a signed medical authorization. The following day, the ALJ cancelled the hearing scheduled for June 21, 2010, and entered an award dismissing Claimant's hearing request.

¶15 Claimant retained an attorney and timely requested administrative review. Through counsel, Claimant argued that her failure to respond to Zurich's discovery requests was due to her desire to first obtain legal counsel.¹ The ALJ supplemented and

¹ A claimant in a workers' compensation proceeding has the right to be represented by an attorney. *Martin v. Indus. Comm'n*, 120 Ariz. 616, 617, 587 P.2d 1193, 1194 (App. 1978). In *Martin*, this court set aside an award and found an abuse of discretion when the unrepresented claimant asked for a continuance to obtain legal

affirmed his award finding that the claimant "failed to provide good cause for completely ignoring her responsibilities to cooperate in discovery and to comply with the duly-issued Order by the undersigned compelling her to do so." Claimant timely appeals, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A), and Ariz. R.P. Spec. Act. 10.

DISCUSSION

¶16 On appeal, an ALJ's imposition of sanctions will be overturned only for an abuse of discretion. *Nolden v. Indus. Comm'n*, 127 Ariz. 501, 503-04, 622 P.2d 60, 62-63 (App. 1980). Although the ALJ is not bound by technical rules of evidence and procedure, workers' compensation proceedings must be conducted so as to "achieve substantial justice." A.R.S. § 23-941(F).

¶17 The presiding ALJ has broad discretion to impose sanctions on any party who willfully fails to appear for a deposition after being served with proper notice. See A.A.C. R20-5-145(E). These sanctions may include refusing to permit the introduction of evidence at the ICA hearing, imposition of attorney's fees and costs, or dismissing the hearing request. See

counsel at the first hearing and the ALJ denied her request. *Id.* at 618, 587 P.2d at 1195. Here, the ALJ wrote to the claimant on May 3, 2010, to inform her of her right to counsel and how to obtain that representation.

A.A.C. R20-5-157(A). The presiding ALJ also may relieve a party of sanctions imposed for good cause shown. A.A.C. R20-5-157(B).

¶18 Our supreme court has held that "the sanction of dismissal though within the sound discretion of the trial court . . . is harsh and not to be invoked except under extreme circumstances." *Austin v. City of Scottsdale*, 140 Ariz. 579, 581, 684 P.2d 151, 153 (1984) (internal citations omitted). Before imposing the sanction of dismissal, an ALJ must consider a variety of factors, including:

- (1) whether a pattern of failure to cooperate with discovery exists;
- (2) whether counsel has acted with due diligence;
- (3) whether evidence has been presented to support the claimant's case;
- (4) whether there is a reasonable explanation for the failure to comply with the discovery requests;
- (5) whether the employer/carrier has suffered prejudice; and
- (6) the procedural context of the hearings.

See *Brown v. Indus. Comm'n*, 154 Ariz. 252, 254, 741 P.2d 1230, 1232 (App. 1987).

¶19 In this case, the ALJ found that Claimant had willfully failed to participate in the proceedings and in Respondents' reasonable discovery efforts by missing two depositions and failing to answer interrogatories. He concluded that her failure to comply with discovery requests established a pattern of failure to cooperate, or abandonment of her hearing request. Finally, stating

that he had considered the *Brown* factors, he concluded that Claimant had not shown good cause to be relieved from sanctions and that the sanction of dismissal was appropriate.

¶10 The duration of the action was brief: barely two months elapsed between the issuance of the notice of hearing and the order dismissing the hearing request, and less than three weeks elapsed between the ALJ's May 3, 2010 letter -- informing Claimant of her right to be represented by counsel -- and the dismissal order. The limited record before us does not reveal any substantial efforts to resolve the discovery dispute short of outright dismissal.²

¶11 "[J]ustice requires that when possible a matter be determined upon its merits." *King*, 160 Ariz. at 164, 771 P.2d at 894 (quoting *Gorman v. City of Phoenix*, 152 Ariz. 179, 183, 731 P.2d 74, 78 (1987)). Here, the record shows Claimant had a potentially meritorious claim. Though her discovery lapses were not appropriate, in view of the short time that elapsed between the date the court informed her of her right to counsel and the date she retained counsel, we do not detect a pattern of willful abuse. We have no reason to believe that lesser sanctions and a continuance would not have secured her compliance and remedied any speculative prejudice that Respondents might have suffered.

² We remain cognizant that an unrepresented claimant has an obligation to act in accordance with the ICA rules governing discovery and that Claimant failed to make her objections to appearing for her deposition in accordance with the applicable ICA

¶12 Taken as a whole, the record does not contain the prerequisite "extreme circumstances" for imposing the sanction of dismissal. *Austin*, 140 Ariz. at 581, 684 P.2d at 153. We therefore conclude that the dismissal was an abuse of discretion.

CONCLUSION

¶13 For the reasons given above, we set aside the ALJ's award of dismissal of Claimant's hearing and remand for proceedings in accordance with this decision.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

PATRICK IRVINE, Judge

/s/

MAURICE PORTLEY, Judge

rule. See A.A.C. R20-5-101(C); e.g., *Huff v. Indus. Comm'n*, 18 Ariz. App. 436, 439, 503 P.2d 394, 397 (1972).